IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-148

ARTHUR RANDALL SANDERS, JR.
Gulf Coast News Agency Inc., and Trans World American, Inc. A/K/A TWA, Inc.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 592 F.2d 788. The opinion of the denial of the Petition for Rehearing and Petition for Rehearing En Banc is reported at 597 F.2d 63.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 2, 1979. A Petition for Rehearing and Petition for Rehearing En Banc was denied on June 15, 1979. A Petition for a

Writ of Certiorari was filed on July 16, 1979 and the Petition was granted on October 15, 1979.

CONSTITUTIONAL PROVISION AND STATUTES

Constitution of the United States:

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. §371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any

act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. §1462 provides in pertinent part:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. §1465 provides:

Whoever knowingly transport in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cost phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be

fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

QUESTIONS PRESENTED

I. Was there a prior restraint when the Government kept twelve (12) cartons containing 871 films for approximately two (2) years without obtaining a judicial determination of obscenity?

II. Was the Government's acquisition of the films a seizure?

III. Was there an independent search when the FBI viewed the films two (2) months after receiving the films.

IV. Is the proper remedy the suppression of the films as evidence at trial rather than the return of the films to the petitioners with the Government retaining sample films for evidentiary purposes?

V. Does the holdings of *U.S. v. Chadwick*, 433 U.S. 1 and *Arkansas v. Sanders* ____ U.S. ____, 61 L.Ed.2d 235, require a warrant to open and view the contents of the film boxes?

VI. Is it error to fail to inform the jury that children are not to be considered in determining community standards when timely requested?

STATEMENT OF THE CASE

Arthur Sanders, Gulf Coast News Agency, Inc., and Trans World America, Inc., a/k/a TWA, Inc. were indicted and convicted for violation of 18 U.S.C. 371, for conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. §1462, and knowingly to transport obscene material interstate for the purpose of sale or distribution, in violation of 18 U.S.C. §1465. Several pre-trial motions were filed and ruled upon by the court. A motion to suppress evidence and return property was filed and denied after a hearing. The Court imposed a three (3) year sentence on Sanders and imposed a $10,000 fine on TWA, Inc. and a $33,000 fine on Gulf Coast News Agency, Inc.

The facts are fully set out in the Court of Appeals majority and dissenting opinions reported at 592 F.2d 788.

Since the issues raised in this brief deal only with search and seizure, and a failure to affirmatively inform the jury that children are not part of the community in determining obscenity, a detailed summary of how the FBI obtained possession of the obscene material will only be dealt with. Petitioners concede that the factual issues of innocence and guilt and obscenity were resolved against them by the jury and therefore are not raised in this brief.

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation were shipped via Greyhound Package Express from

St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6). The shipment, directed to "Leggs, Inc.," on a "Will Call" basis, was reforwarded to Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, Inc. ("LPI") was contacted to pick up the package (R.T. Vol. 1 Supp. at 20-21, 33-35).

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, September 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve (12) unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the Indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages since LPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at (C-146-147, C-150, C-178).)

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all

twelve (12) cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and that the FBI would pick them up. (R.T. Vol. Supp. at 63, 65, 90, 107, 133, 143-144, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 12 cartons containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from the container. Mandyck or another FBI agent opened a film box to attempt to see the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse via Greyhound using the name "Leggs, Inc." as consignee —"Legs" being the nickname of a female employee in

the Atlanta warehouse. In the past, shipments had been made using the name, "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager of Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-229; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrive their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl named Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three time looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from

someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia, that he had the films in question. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

SUMMARY OF ARGUMENT

1. The FBI obtained twelve (12) cartons containing 871 individual films from a third party and then waited two (2) months to view the films, and then waited approximately two (2) years to indict the petitioners without ever obtaining a judicial determination of obscenity. This amounts to a classic prior restraint in violation of *Marcus v. Search Warrant*, 367 U.S. 717, and *Heller v. N.Y.*, 413 U.S. 483.

2 & 3. The government's acceptance of the films from a third party amounts to a seizure since the petitioners had a constitutionally protected privacy interest in the twelve (12) cartons, and the FBI had no right to keep the films, and then subsequently view the films in their office, since a neutral magistrate had not issued a warrant authorizing the seizure of the films, and there had been no finding of probable obscenity by a neutral magistrate.

4. The proper remedy in this case is suppression of the illegally obtained evidence, rather than the return of the

property to the owners, and the government retaining sample films for evidentiary purposes. The violation of the First and Fourth Amendments require the suppression of the evidence especially under the particular facts of this case since the government retained the films for a considerable period of time and was careful not to let the owners know where the films were. The remedy of return comes too late.

5. The FBI had ample time to obtain a warrant to open the boxes of films, and then view them. In *U.S. v. Chadwick*, 433 U.S. 1, and *Arkansas v. Sanders*, ____ U.S. ____, 61 L.Ed.2d 235, this court held that even though the FBI or police had probable cause to search a footlocker and suitcase, a warrant had to be obtained to search them. The FBI failed to obtain a warrant to open the film boxes and view the films and therefore the Fourth Amendment requires the evidence be suppressed.

6. Defense counsel timely submitted several prospective jury instructions informing the jury that the average adult person is to be considered when applying the test of contemporary community standards. The District Court rejected these instructions and merely charged the jury that obscenity is determined by the standards of the "average person of the community as a whole" whom the District Court described as a person having an " 'average and normal attitude toward, and an average interest in sex.' " In *Pinkus v. U.S.*, 436 U.S. 293, this court held that children are not to be considered in determining community standards. In *Pinkus*, the court affirmatively charged the jury that children were part of the community. In the case at bar, the District Court refused to inform the jury that children were not part of the community. Logic and common sense compels this

Court to require a district court judge, when requested, to inform the jury that children are not to be included in applying community standards either on a constitutional basis or in this court's supervisory capacity over federal courts.

ARGUMENT

I.

THERE WAS A PRIOR RESTRAINT WHEN THE GOVERNMENT KEPT TWELVE (12) CARTONS CONTAINING 871 FILMS FOR APPROXIMATELY TWO (2) YEARS WITHOUT OBTAINING A JUDICIAL DETERMINATION OF OBSCENITY.

This Court has held on numerous occasions that some form of judicial procedure designed to focus searchingly on the question of obscenity must precede government interference with material that is presumptively protected by the First Amendment. *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant of Property*, 367 U.S. 717. This rule was reaffirmed in *Heller v. N.Y.*, 413 U.S. 483.

In the instant case, the FBI obtained possession of twelve (12) cartons of films on October 1, 1975. They viewed the films approximately two (2) months later. An indictment was returned against the petitioners and the district court viewed the films during the trial on August 15, 1977 (Vol. 8, D-122-D-127). Therefore, a judicial determination of obscenity could have been made as to those five (5) films of the twenty-five (25) film titles held by the FBI on August 15, 1977. No judicial officer has ever viewed the remaining twenty (20) film titles consisting of 846 films.

The government's failure to seek a determination of obscenity from a neutral magistrate during this approximate two (2) year period, October 1, 1975 to August 15, 1977, violates the constitutional rule set out in the aforementioned cases.

The government relies heavily on *U.S. v. Cangiano*, 491 F.2d 906 (2nd Cir. 1974) certiorari denied, 419 U.S. 904. In *Cangiano* since the defendants were operating an underground operation in hard core pornography with clandestine storage facilities, they were not entitled to First Amendment protection. However, the FBI had already obtained a warrant, and the defendants could have requested an adversary hearing. The Court in *Cangiano* merely held that there was no requirement of a prior adversary hearing before seizure.

Petitioners do not lose their Constitutional rights because they furtively distribute certain materials to a certain class of people who may or may not be small in numbers. The First Amendment protects the public's right of access to all types of materials.

In *Roaden v. Kentucky*, 413 U.S. 496, 503, this Court held that the seizing of a film in a theater, or the seizure of all books in a bookstore without authority of a constitutionally sufficient warrant, is plainly a prior restraint. Prior restraint of the right of expression calls for a higher standard in the evaluation of reasonableness.

The FBI had ample time to apply to a magistrate after taking possession of the twelve (12) cartons of films.

Defense counsel cannot find a case holding that furtively distributed films raises no First Amendment protection.

Since the government did not observe the minimum procedural safeguards demanded in *Heller*, and *Roaden*,

and the FBI retained 871 films, this amounted to a classic prior restraint. The FBI blocked the distribution of these films, and to return 846 films to petitioners two (2) years later, and keep 25 films for prosecution, does not cure the violation of their constitutional rights.

Where a mass seizure takes place, whether for destruction or prosecution, the requirement of *A Quantity of Books* and *Marcus* must be met. A judicial determination of obscenity must be made immediately, and if not, the first amendment rights of petitioners are clearly violated.

II.

THE GOVERNMENT'S ACQUISITION OF THE FILMS WAS A SEIZURE.

The FBI received the films from a third party. The films at that point were not contraband, and there had been no judicial determination of obscenity by a detached magistrate. Keeping in mind that a film cannot be seized as an incident to a lawful arrest, *Roaden v. Kentucky*, 413 U.S. 496, the FBI was required to go to a magistrate and afford a judicial officer an opportunity to "focus searchingly on the question of obscenity." *Roaden v. Kentucky*, 413 U.S. at 506. Otherwise the FBI, without a warrant, could not retain the films.

The First Amendment imposes its own more stringent limitations on obtaining and executing a search warrant. The First Amendment is an independent source of restrictions upon the power of the police to take expressive material. Therefore, the government's acceptance of the films in this case is a form of seizure. It certainly prevented the distribution of the material, and obviously caused a prior restraint. The FBI's conclusion that the films were obscene without a judicial determination vio-

lates the aforementioned constitutional rules.

Had the FBI went to a magistrate with pictures of the film boxes which gives description of the contents of the films, then a magistrate conceivably could have issued a warrant to seize the twelve (12) cartons. Compare *U.S. v. Kelly*, 529 F.2d 1365 (8th Cir. 1976), where the Court held that the Government's acceptance of the material from a common carrier constituted a seizure requiring a warrant, and concluded that the warrantless seizure was so unreasonable as to necessitate the operation of the exclusionary rule. *U.S. v. Kelly*, 529 F.2d at 1371.

The third party, L'Eggs Products, Inc., had no right to the twelve (12) cartons. The petitioners had not relinquished their rights to the property, and the FBI had no right to keep the property since it was not contraband, was presumptively protected by the First Amendment, and the withholding of 846 films, assuming 25 films could be kept for prosecution, was a classic prior restraint.

III.

THERE WAS AN INDEPENDENT SEARCH WHEN THE FBI VIEWED THE FILMS TWO MONTHS AFTER RECEIVING THE FILMS.

The FBI took possession of the films, and two months later viewed the films on a projector in their office. It therefore could not be seriously argued that there was a continuous search. Since there were no exigent circumstances, the government had a constitutional duty to get a warrant. Compare *Coolidge v. New Hampshire*, 403 U.S. 443.

In *U.S. v. Haes*, 551 F.2d 767 (8th Cir. 1977) the Court held that the screening of the films by the FBI at the

common carrier's office without first obtaining a warrant was a search and required suppression of the evidence.

The majority opinion attempts to distinguish *Haes* on the specious reasoning that the employees of L'Eggs Products, Inc. were able to determine that the films were probably obscene based on the film boxes. The legal conclusions of employees of L'Eggs Products, Inc. have no bearing in determining whether the FBI should have sought a warrant or whether the viewing of the films two (2) months later was an independent search.

Finally the majority opinion cites cases where the government conducted an immediate search on the premises after being called by a private party in order to justify a viewing of films two (2) months later. See *U.S. v. McDaniel*, 574 F.2d 1224 (5th Cir. 1974); *U.S. v. Blanton*, 479 F.2d 327, 328 (5th Cir. 1973); *U.S. v. Pryba*, 502 F.2d 391, 401 (D.C. Cir. 1974); *U.S. v. Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975).

Since we are dealing with First Amendment considerations as well as Fourth Amendment requirements, the two (2) months delay in screening the films should be considered an independent search.

IV.

THE PROPER REMEDY IS THE SUPPRESSION OF THE FILMS AS EVIDENCE AT TRIAL, RATHER THAN THE RETURN OF THE FILMS TO THE PETITIONERS WITH THE GOVERNMENT RETAINING SAMPLE FILMS FOR EVIDENTIARY PURPOSES.

The per curiam opinion denying Petitions for Rehearing and Petitions for Rehearing *En Banc, Sanders et al. v.*

U.S., 597 F.2d 63, hold that the appropriate remedy for a violation of the First Amendment due to a prior restraint is return of the property and not its suppression as evidence at trial with the government retaining sample films for evidentiary purposes.

As has been pointed out in previous discussions, the evidence was seized not only in violation of the First Amendment, but of the Fourth Amendment as well.

Many courts have held that when materials are seized in violation of the First Amendment, the appropriate remedy is return of the property, but not suppression at trial. *U.S. v. Bush*, 582 F.2d 1016, 1021 (5th Cir. 1978); *U.S. v. Sherwin*, 539 F.2d 1, 8 (9th Cir. 1976); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 641 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968). The distinguishing point in the aforementioned cases is that the matter was seized pursuant to a warrant, but without a prior adversary hearing.

First, the return of the films to the owners comes entirely too late. Therefore, to suggest that the remedy is to return the films to the owners two (2) years later is no remedy at all.

In *Roaden v. Kentucky*, supra, this Court applied the exclusionary rule to the unlawful government action which affected expressive materials. The seizure of the film incidental to a lawful arrest in *Roaden* required suppression. Therefore, whether the suppression of the films are justified under traditional Fourth Amendment doctrine or whether the government action as a seizure is primarily a First Amendment violation, the exclusion of the films as evidence, rather than the return of the films to the owners, is the proper remedy.

Recently in *Lo-Ji Sales, Inc., v. N.Y.*, ____ U.S. ____, 60 L.Ed.2d 920, this court reversed the denial of a motion to suppress the evidence where there had been a seizure of almost 1,000 items, and a warrant had been issued limiting the seizure to only a few items. Since suppression was the proper remedy in *Lo-Ji* for causing a prior restraint, as well as the police seizing materials beyond what the warrant had authorized to be seized, suppression should be the remedy in the present case. The FBI seized all the materials instead of limiting their seizure to what would be required for prosecution, and further violated the Fourth Amendment in not obtaining a warrant.

V.

THE HOLDINGS OF *U.S. V. CHADWICK*, 433 U.S. 1 AND *ARKANSAS V. SANDERS*, ____ U.S. ____, 61 L.Ed.2d 235, REQUIRE A WARRANT IN ORDER TO OPEN AND VIEW THE CONTENTS OF THE FILM BOXES.

In *U.S. v. Chadwick*, 433 U.S. 1, this court held that the FBI could not search the contents of a footlocker after it took exclusive custody of the item without obtaining a warrant.

In *Arkansas v. Sanders*, ____ U.S. ____, 61 L.Ed.2d 235, this court held that personal luggage taken from an automobile could not be searched without first obtaining a warrant. In the instant case, even if the FBI had probable cause to search the contents of the twelve (12) cartons, a judicial warrant must be obtained before the containers can be searched.

VI.

IT IS ERROR TO FAIL TO INFORM THE JURY THAT CHILDREN ARE NOT TO BE CONSIDERED PART OF THE COMMUNITY IN DETERMINING COMMUNITY STANDARDS WHEN TIMELY REQUESTED.

In *Pinkus v. U.S.*, 436 U.S. 293, this court held that it was constitutional error to instruct the jury that children are to be included as part of the community in determining community standards as that term relates to the definition of obscenity.

Similarly in *U.S. v. Bush*, 582 F.2d 1016 (5th Cir. 1978) it was error for the district court to inform the jury that the community consists of the young and old as this allowed the jury to consider children in deciding whether the materials are obscene.

In the present case defense counsel submitted several jury instructions informing the jury that in determining community standards, the average adult person is the test in applying community standards. (Vol. 1, Exhibit 45, instruction No. 16, 18, 19, 21, 22, 23, 24, 27, 28, 29, and 54). The district court denied all instructions, and merely charged the jury that the average person is to be applied in determining community standards as it relates to obscenity.

Since this Court has held it was error to inform the jury that children are to be considered in determining community standards as that term relates to the definition of obscenity, why shouldn't the jury be affirmatively told that children are not considered in determining community standards as that term relates to the definition of obscenity? Why assume that the jury would not

include "children" or "very young people" or "teenagers" in determining community standards?

This court should hold either as a matter of constitutional law or under the supervisory power of this court over federal trials that the jury must be informed that the average person means the average adult person in determining community standards.

Defense counsel submitted timely instructions on this point of law, and there is no logical reason on legal reason for the district court to reject this rule of law. In dealing in the sensitive area of First Amendment freedoms, every precaution should be taken to insure that the jury is fully instructed on the law of obscenity.

Why leave the jury guessing as to whether children are to be considered? Common sense should compel this court to hold, that when timely requested, the jury should be affirmatively informed that "the average person of the community" means the average adult person.

CONCLUSION

For the foregoing reasons, petitioners' convictions and sentences should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GLENN ZELL, certify that I duly mailed copies of the foregoing Brief for Petitioners to W. Michael Mayock, 26th Floor, 10100 Santa Monica Blvd., Los Angeles, California 90067 and the Honorable Wade H. McCree, Jr., Solicitor General of the United States, U. S. Department of Justice, Washington, D. C.

This ____ day of November, 1979.

GLENN ZELL, P.C.

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